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No. 03-337

IN THE

# Supreme Court of the United States

PATRICK ROSSI,

*Petitioner,*

*v.*

TROY STATE UNIVERSITY; JACK HAWKINS,
Individually and as Chancellor of Troy State University,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to this proceeding are named in the caption of this case. Rule 29.6 does not apply to this case because Respondents are a public agency and a public official of the State of Alabama.

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## STATEMENT OF THE FACTS

Rossi is, and was at all times relevant to this case, an associate mathematics professor at Troy State University, and is a practicing Jehovah's Witness. He became an assistant professor in August of 1993, and applied for promotion four years later in 1997. That application was denied. Rossi applied for promotion and tenure the following year, and that application was granted.

The mathematics department did not have a permanent "Chair" from 1996 to 2000. Diane Porter, another professor in the math department, served as Acting Chair from 1996 to 1998. Rossi then served as Acting Chair from 1998 to 2000. He resigned from the position on August 7, 2000 when the Chancellor sought to appoint a full time or non-acting Chair. Rossi removed himself from consideration for the full time position. Diane Porter was appointed as the permanent chair, and Rossi remained as a full time professor of mathematics.

## REASONS FOR DENYING THE PETITION

**1. Rossi claims four instances of religious discrimination. In the first three instances, Rossi is still unable to establish a prima facie case of discrimination, therefore Rossi has not shown any reason that his petition be granted.**

Rossi filed his discrimination suit pursuant to Title VII and 42 U.S.C. § 1983. He brings this petition for writ of certiorari for the determination of whether he should be allowed to present his case to a jury regarding four separate instances of alleged discrimination. Rossi is asking this Court to decide whether or not the Eleventh Circuit Court of

Appeals decided this action contrary to the rules of shifting burdens of proof under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In order to apply the rules of shifting burdens of proof, Rossi must first show the court that he can prove a prima facie case of discrimination. *Id.*

Rossi is asserting a hostile work environment claim, failure to promote claims and a disparate treatment claim. In the hostile work environment claim, one of the failure to promote claims and the disparate treatment claim, Rossi is unable to prove a prima facie case of religious discrimination. Therefore, the petition for writ of certiorari should be denied, as the correct rulings on his four claims have been made on three separate occasions in the lower courts.

**a. Rossi cannot set out a prima facie case for his hostile work environment claim in that he cannot show that the harassment was sufficiently severe or pervasive as to alter the terms and conditions of his employment.**

To prove a prima facie case for a hostile work environment claim, Rossi must show: (1) that he belongs to a protected group; (2) that he has been subjected to harassment that was unwelcome; (3) the harassment was based on his religious beliefs; (4) the harassment was sufficiently severe or pervasive as to alter the terms and conditions of his employment and create an abusive working environment; and (5) a basis for holding the employer liable. *Gupta v. Florida Bd. Of Regents*, 212 F.3d 571, 582 (11th Cir. 2000).

Respondent concedes that Rossi belongs to a protected group. However, Rossi has not offered sufficient evidence

that he was subjected to harassment that was unwelcome or that any harassment was based on his religious beliefs. He only stated in his complaint that he was humiliated and embarrassed by Respondents because of his religious beliefs and Respondents have sought to treat him "in such a manner as to cause him to resign." Even when giving Rossi the benefit of the doubt by assuming he could show the second and third elements, he certainly has not shown that the harassment was sufficiently severe or pervasive as to alter the terms and conditions of his employment. Rossi alleges that the Pullens, people who were cordial to him at one time, became resentful, the Pullens interfered with his work and Diane Porter was insubordinate to him and not punished for it. There is no evidence to suggest that religion had anything to do with the Pullens not being cordial or Diane Porter not being punished. Even if Rossi did produce any evidence to suggest religion was the basis for people being mean to him or Diane Porter not being punished for insubordination, Rossi would still need to produce evidence that the harassment was sufficiently severe or pervasive as to alter the terms and conditions of his employment.

In *Harris v. Forklift Systems, Inc.*, this Court expressed the conditions in which a workplace comes to the point as to violate Title VII. That point is reached when the workplace is "permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). In Rossi's brief to this court, Rossi still offers no evidence to prove how the Pullens not being cordial, the Pullens interfering with his work or Diane Porter not being punished for insubordination were first, because of his religion and secondly, that those actions were sufficiently severe enough or pervasive enough as to alter the terms and conditions of his employment. In fact, Rossi still offers no

proof that they actually occurred. Rossi simply says that the Court of Appeals "acknowledged that Rossi **alleged** [that his "supervisory chain" humiliated and embarrassed him because of his religion and sought to cause him to resign, and that Dean Pullen and his wife became resentful and interfered with his work and did not discipline a person who was insubordinate to Rossi.] (See Petitioner's Brief, p. 7, emphasis added) The key word is alleged. Yes, the Court of Appeals acknowledged that Rossi alleged those things. However, what the Court of Appeals did not do was acknowledge that Rossi produced sufficient evidence to show that those things actually occurred. Without Rossi showing that these accusations occurred, he cannot prove a prima facie case for a hostile work environment claim. Therefore, no rehearing of this claim is necessary.

**b. In Rossi's disparate treatment claim, he has not shown where anyone outside of his protected class was treated any differently than he was.**

Rossi's disparate treatment claim involves him alleging that he was not provided release time for services as a computer laboratory administrator. The elements needed to be shown in Rossi's disparate treatment claim are the same as the failure to promote claims. They are: (1) that Rossi is in a protected class; (2) Rossi applied for and was qualified to be selected for a position; (3) Rossi was not selected; and (4) someone from outside his class was selected. *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1333 (11th Cir. 1998). Assuming Rossi has shown the first three elements, he still has not shown the last. Rossi claims that other administrators at Troy State University were provided release time, yet he gives no specific names, offers no proof, no dates. Furthermore, Dean Pullen stated it is the

department's policy not to give release time for the types of services rendered by a computer laboratory administrator. There is not sufficient evidence that other similarly situated people outside Rossi's protected class were given the release time for performing the same duties Rossi did. Therefore, there is no reason Rossi's claim of disparate treatment should be reheard.

**c. Rossi was not promoted to associate professor in 1997 because he had not been employed at Troy State University for five years, as is required by University policy and clearly stated in the Troy State University faculty handbook.**

To prove a prima facie case of discriminatory failure to promote, Rossi must show that (1) he was in a protected group; (2) he was not given the promotion; (3) he was qualified for the promotion; and (4) someone outside of the protected group was given the promotion. *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1333 (11th Cir. 1998).

The first instance where Rossi is alleging discriminatory failure to promote is when he was not promoted to associate professor in 1997. In this instance, Troy State did not promote Rossi because he had not had "a minimum of five consecutive years of full-time teaching at the rank of assistant professor for Troy State University" as is required by the University's policy in the promoting of assistant professors to associate professors. Rossi was hired on or about September 1, 1993. Rossi applied for associate professor on or about October 10, 1997. Rossi was not employed for the required five years. That is the reason he was not promoted to associate professor. There is not sufficient evidence that his religious beliefs had anything to do with it. The very next year, after

he had been employed for five years, he again applied for associate professor. This time, because he had been employed for the required five years, he was promoted to associate professor. There is no reason Rossi's first claim of discriminatory failure to promote is should to be reheard.

**2. In the instance where Rossi was not appointed to department chair, Rossi claims a prima facie case of discrimination. However, Respondents had a legitimate nondiscriminatory reason for not appointing Rossi and Rossi has failed to sufficiently show that the legitimate nondiscriminatory reason was not the actual reason relied upon by Respondents.**

The final instance in which Rossi is claiming religious discrimination is when Respondents did not appoint Rossi to the position of Chair of the Mathematics Department. This is another discriminatory failure to appoint claim. To have a prima facie discriminatory failure to appoint claim, the Rossi must show that: (1) he was in a protected group; (2) he was not given the appointment; (3) he was qualified for the position; and (4) someone outside of the protected group was given the position. *Standard v. A.B.E.L. Services, Inc.*, 161 F.3d 1318, 1333 (11th Cir. 1998).

In his petition for writ of certiorari, Rossi urges this Court to again consider *Reeves v. Anderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) as law supporting his contention that he was discriminated against. In *Reeves*, the Supreme Court stated that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employee unlawfully discriminated." 530 U.S. 147. The key phrase that should apply in this instance is "a plaintiff's prima facie case, **combined with substantial**

**evidence.**" *Id.* (*emphasis added*) Rossi's submitted evidence is simply an affidavit stating that he was discriminated against. Rossi is asking this court to say that a single affidavit from the Respondent is substantial enough to outweigh numerous affidavits and school policy offered by the Respondents.

Respondents concede that if Rossi can show the required elements for a prima facie discriminatory failure to promote claim, the Respondents have a legitimate, nondiscriminatory reason for not promoting Rossi to department chair. If the Respondent satisfies the burden of showing that a legitimate, nondiscriminatory reason exists for failing to promote the Rossi, the burden shifts back to Rossi to show that Respondents' reason is merely a pretext for religious discrimination. *Berman v. Orkin Exterminating Co., Inc.*, 160 F.2d 697 (11th Cir. 1999). Rossi has failed to accomplish this. The reason he was not appointed was when Respondents compared his performance as acting chair to Diane Porter's performance as acting chair, Respondents believed that Diane Porter ultimately did the better job. That is why she received the appointment. Dean Pullen states in his affidavit that Rossi "was not a strong leader or administrator" while he was acting chair. The decision not to appoint Rossi to department chair was not in anyway grounded in religious motivation. It was simply based on a comparative analysis of Rossi's work as acting chair and Diane Porter's work as acting chair. Respondents simply felt Diane Porter did a better job, thus she received the appointment. Because this is a satisfactory, legitimate and nondiscriminatory reason for not giving Rossi the position of department chair, according to *Berman*, the burden shifts back to the Rossi to sufficiently show that his religious beliefs were the real reason behind him not being appointed. There has been no such evidence offered by Rossi. Rossi simply states that he replaced

Diane Porter as interim chair because she was overwhelmed at the time. Rossi does nothing to refute the legitimate and nondiscriminatory reason that his performance as interim chair was poor when compared to Diane Porter's performance. In not doing so, Rossi has not met his burden of showing that the legitimate and nondiscriminatory reason was merely a pretext. Therefore, there is no sound reason for this court to rehear Rossi's claim of discriminatory failure to appoint in regards to the position of Chair of the Mathematics Department.

## CONCLUSION

Rossi has not and cannot meet his burden of showing a prima facie case exists in three of his allegations. In the fourth allegation, he has not provided sufficient evidence that Respondents' legitimate, nondiscriminatory reason for not giving him the appointment as "Chair" was a pretext for religious discrimination. Further, the fact that the Eleventh Circuit Court of Appeals decided this case without publishing an opinion does not override the fact that Rossi could not satisfy his burdens of proof. Respondents respectfully submit this brief in support of their contention that there is no sound reason for remanding this cause as requested by Rossi.

Respectfully submitted,

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